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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-606

LUMBER, PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362,

Appellant,

v.

ROBERT A. WONDZELL and THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ALASKA

MOTION OF THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS TO DISMISS OR AFFIRM

AVRUM M. GROSS
Attorney General,
State of Alaska

CAROLYN E. JONES
Assistant Attorney General,
420 "L" Street, Suite 100
Anchorage, Alaska 99501
(907) 276-3550

Counsel for Appellee,
Alaska State Commission
For Human Rights.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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ON APPEAL FROM THE SUPREME COURT OF ALASKA

MOTION OF THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS TO DISMISS OR AFFIRM

Appellee Alaska State Commission for Human Rights respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Alaska on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument. Should the jurisdictional statement of appellant be deemed a petition for certiorari, the State Commission respectfully submits that such petition should be denied for the reasons stated herein.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE.

A. The Statute

This appeal raises the question of the validity of the Alaska human rights law, AS 18.80.220, as applied to a union and an employer operating pursuant to a union security agreement. This statute provides that it is unlawful for an employer or a labor organization to refuse employment to a person, to bar him from employment, to exclude or expel him from membership or to otherwise discriminate against him in a term, condition, or privilege of employment because of his religion.

B. The Proceedings Below

Appellee Robert Wondzell has been a member of the Seventh Day Adventist Church since 1966 and, at the time this action arose, an employee of Alaska Wood Products in Wrangell, Alaska for ten years. His employment was covered by a union security agreement between Alaska Wood Products (hereafter the employer) and Lumber Production and Industrial Workers Local 2362 (hereafter the union). Under the union agreement, all persons holding Wondzell's job classification must join the union and pay dues as a condition of their employment. In 1974, Wondzell became convinced that his religion required he neither belong to nor financially support a labor union. He thereupon resigned from the union and commenced paying the equivalent of his union dues ($6.75) to the Multiple Sclerosis Chapter of Wrangell. Wondzell subsequently offered to give up his union benefits and to continue equivalent monthly payments to a mutually agreeable charity as an accommodation to his religious beliefs but the union refused Wondzell's offer.

The union instead, directed the employer to dismiss Wondzell from employment under the terms of the union security agreement.

In November 1974, Wondzell filed a complaint and motion for injunctive relief in the Alaska superior court at Juneau and named the employer and union as defendants. The first cause of action, and the only one relevant to this appeal, alleged that the employer and the union had violated the Alaska human rights law, AS 18.80.220(a), which prohibits an employer or union from barring a person from employment, or otherwise excluding or expelling a person from membership because of his religious beliefs. The court issued a temporary restraining order on November 23, 1974. A hearing on the motion for preliminary injunction was continued until December 13, 1974. In the meantime, the employer and the union moved to dismiss the action on the grounds that the superior court lacked jurisdiction over the subject matter of Wondzell's complaint because Congress had preempted the field of labor relations. On December 17, 1974, the lower court denied both motions. After the Alaska Supreme Court upheld the lower court's denial of Wondzell's motion for a preliminary injunction, the employer discharged Wondzell.

Trial of the action was set for April 1975. Prior to trial on the merits, the Alaska State Commission for Human Rights was granted permission to intervene as a party plaintiff for the purpose of arguing that the State human rights law was not preempted by national labor law and that the State human rights law should be construed to require an employer or a union to reasonably accommodate an employee's religious beliefs.

At the trial the parties stipulated to the nature of Seventh Day Adventists' beliefs on compulsory unionism

and to Wondzell's good faith adherence to those beliefs.[1] The employer was willing to accept Wondzell's proposed accommodation by payment to the Multiple Sclerosis Society in lieu of union dues and to forego all union benefits. The union, however, rejected this compromise and offered instead to allow Wondzell to pay union dues without the obligations of a union member. Because Wondzell believed that his religious tenets forbade any financial support of a union, Wondzell rejected the union's offer as unreasonable. The union had directed its local to strike the employer unless the employer discharged Wondzell.[2]

The lower court held, in relevant part, that (1) it had jurisdiction over the matter; (2) Wondzell's constitutional rights had been violated; (3) that AS 18.80.220 placed a duty on the employer and union to reasonably accommodate Wondzell's beliefs; (4) that the union had offered a reasonable accommodation whereas the accommodation suggested by Wondzell would impose undue hardship on the union and was not required by law.

The union appealed to the Alaska Supreme Court from the first and third of these holdings; Wondzell appealed from the second and fourth. While this case was on appeal, the Alaska Supreme Court decided in *Bald v. RCA Alascom,* 569 P.2d 1328 (Alaska 1977) that Alaska courts have jurisdiction to hear employment discrimination complaints brought against an employer and union who are parties to a union security agreement. Appendix A. The jurisdictional point was, as a result of the *Bald* decision, not discussed by the court in *Wondzell.*

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[1] Giving financial support as well as having one's name on a union's membership rolls is in contradiction to the tenets of the Seventh Day Adventists.

[2] Shortly after trial, the employer was constrained to discharge Wondzell in order to avoid the strike.

The Alaska Supreme Court initially held in *Wondzell* that AS 18.80.220 required an employer and a union to reasonably accommodate an employee's religious beliefs but that to permit Wondzell to avoid payment of his union dues to the union would impose an undue hardship on the union. *Wondzell v. Alaska Wood Products, et al.,* 583 P.2d 860, 867 (Alaska 1978). Subsequently, in its opinion on rehearing, the court noted that the decisions relied on in its previous opinion were no longer good law. *Wondzell v. Alaska Wood Products,* ___ P.2d ___ (Alaska 1979). *Anderson v. General Dymanics Convair Aerospace Division,* 430 F. Supp. 418 (S.D. Cal. 1977) had been overruled by the Ninth Circuit Court of Appeals one week prior to the Alaska Supreme Court's original opinion in *Wondzell. Anderson v. General Dynamics Convair Aerospace Division,* 589 F.2d 397 (9th Cir. 1978), *cert. den.,* 47 U.S.L.W. 3787 (1979). The other decision relied upon, *Yott v. North American Rockwell,* 428 F. Supp. 763 (C.D. Cal. 1977) had been reconciled with the opinions in *Anderson* and its companion case, *Burns v. Southern Pacific Transportation Co.,* 589 F.2d 403 (9th Cir. 1978), *cert. den.* ___ U.S. ___, 99 S.Ct. 843 (1979). *Anderson v. General Dymanics, supra,* 589 F.2d at 402 n.4. Consequently, neither the district court decision in *Anderson* nor the Alaska's court's interpretation of *Yott* was still viable. The Alaska Supreme Court vacated its earlier opinion and held that AS 18.80.220 was intended to be more broadly interpreted than federal law to further the goal of erradicating discrimination, and that it would be anamolous to interpret state law as not requiring accommodation by a labor union when the same accommodation would be compelled by Title VII.

The Union filed its notice of appeal from the Alaska Supreme Court opinion on rehearing on July 11, 1979 and was subsequently granted an extension of time within

which to file its jurisdictional statement. The union filed its jurisdictional statement with this court on October 11, 1979.

II.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

The case presents no substantial question not previously decided by this court.

This Court's appellate jurisdiction is determined by 28 U.S.C. §1257. Appeal from a state court of last resort must fall within either of two prescribed categories:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The union has taken its appeal pursuant to 28 U.S.C. § 1257(2). In deciding in favor of Wondzell and against the union, however, the Alaska Supreme Court has taken no action which would bring the union within the appellate jurisdiction of the court.

The union, as the cornerstone of its argument on appeal to this Court, has attempted to characterize the ruling of the Alaska Supreme Court as a decision against the validity of 29 U.S.C. §158(a)(3), of the National Labor Relations Act (hereafter section 158(a)(3)), as amended by the Taft-Hartley Act. This section permits

union security agreements, and the consequent discharge of employees who fail to join the union or pay their dues. This proviso in section 158(a)(3), however, is an exception to the general philosophy of the NLRA that no employee may be discriminated against on the basis of his membership or nonmembership in a union.[3] The Alaska Supreme Court did not question the validity of section 158 (a)(3), and no language is found in either its original opinion or its opinion on rehearing which decides, as a matter of either Federal or state law, against the validity of section 158(a)(3) of the National Labor Relations Act.

The union places its principal reliance in the jurisdiction of this Court upon the fact that section 158(a)(3) explicitly sanctions union security agreements which, as a condition of employment, require all employees to belong to the union. Because, with the exception of the health care amendment, 29 U.S.C. §169,[4] Congress has

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[3] Section 8(a)(3) makes it an unfair labor practice for an employer:

> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein . . .

[4] 29 U.S.C. §169. Individuals with religious convictions

> Any employee of a health care institution who is a member of and adheres to established and graditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and

[footnote continued]

repeatedly resisted attempts to create additional exceptions to section 158(a)(3), the union argues that Congress would not create exceptions to section 158(a)(3) indirectly through Title VII legislation when Congress had refused to make amendments directly to section 158(a)(3). The crux of the union's argument is, therefore, its unwavering position that the goal of the NLRA in permitting union security agreements takes precedence over other Congressional goals such as the elimination of employment discrimination and that federal and state civil rights laws operate on the periphery of the National Labor Relations Act.

The union's argument glosses over the fact that, with the advent of the 1964 Civil Rights Act, Congress has identified a competing national goal which is of the highest priority: the elimination of discrimination. See *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1968). Furthermore, since the case of *Alexander v. Gardner Denver,* 415 U.S. 36 (1974), it has been well established that the National Labor Relations Act, as amended by the Taft-Hartley Act, does not relieve an employer of its duty under federal law, *i.e.,* Title VII of the 1964 Civil Rights Act, not to discriminate against its employees. *Id.* at 49. Despite the fact that the NLRA may contain a mechanism for resolving grievances based on the employer's discriminatory conduct, the victim of discrimination is not limited to the relief available under

initiation fees, to pay sums equal to such dues and initiation fees to a non-religious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code [26 U.S.C. §501(c)(3)], chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

the NLRA. The NLRA is only one of several federal overlapping remedies which exist to eliminate employment discrimination.[5] *Id.* at 47. Furthermore, the collective bargaining agreement may not be used to violate Title VII or exempt an employer or union from a duty to reasonably accommodate an employee's religious beliefs. *Trans World Airlines v. Hardison,* 432 U.S. 63 (1977). In fact, whenever there has been a conflict between Title VII and section 158 of the NLRA, the balance has been struck in favor of Title VII. *Burns v. Southern Pacific Transportation Co., supra,* 589 F.2d at 400; *Anderson v. General Dynamics Convair Aerospace, supra,* 589 F.2d at 400; *McDaniel v. Essex,* 571 F.2d 338, 343 (6th Cir. 1978); *Cooper v. General Dynamics,* 533 F.2d 163, 170 (5th Cir. 1976), *cert. den. sub nom International Association of Machinists v. Hopkins,* 433 U.S. 908 (1978).

Burns, Anderson, McDaniel and *Cooper* are particularly persuasive because the circuit court of the fifth, sixth and ninth circuits has each ruled that the Taft-Hartley Act does not relieve the employer and the union from their duties under Title VII to reasonably accommodate the individual religious needs of its employees. Moreover, in *Burns, Anderson* and *Cooper,* the circuit courts specifically addressed the question whether the duty to reasonably accommodate required an accommodation of an

[5]This Court reiterated its view that Congress has taken the piecemeal approach to the monumental task of eliminating employment discrimination nationwide in *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975). In *Johnson,* the Court held that the alleged victim of discrimination had separate remedies under Title VII and the Civil Rights Act of 1866 (42 U.S.C. §1981).

employee's religious belief that he could not financially support a union.[6] In each case, it was held that excusing an employee from financially supporting the union did not as a matter of law cause the union undue hardship. Moreover, in *Burns* and *Yott v. North American Rockwell,* 602 F.2d 904, 907 (9th Cir. 1979), the court held that a substitute payment to a charity was in fact a reasonable accommodation of the employee's religious beliefs. Furthermore, to demonstrate undue hardship as a matter of fact, the union would be required to show something more than a fellow worker's grumblings. The union would have to demonstrate that the accommodation was an actual imposition on the employee's coworkers or caused a disruption of work routine. *TWA v. Hardison, supra,* 432 U.S. at 80; *Anderson v. General Dynamics Convair Aerospace, supra,* 589 F.2d at 402.

The foregoing discussion speaks to the existence of two competing national policies: promoting labor peace and eliminating employment discrimination. Since federal statutes do not preempt each other, *Cooper v. General Dynamics, supra* 533 F.2d at 169, the presence of federal law prohibiting employment discrimination does not compel the conclusion that AS 18.80.220 is not preempted by the NLRA. Title VII does, however, weaken the union's position that the interest in promoting labor peace through union security agreements overrides other Congressional interests and that agencies, other than the National Labor Relations Boards, have the explicit responsibility to prevent religious discrimination in the labor-management context.

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[6]This question was also presented to this Court three times in the petitions for certiorari filed in *Burns, Anderson* and *Cooper,* and each time this Court declined to grant certiorari.

In fact, *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244 (1959) the leading case on preemption in the field of labor-management relations even recognized that there is no federal preemption of "interests. . . deeply routed in local feeling and responsibility" absent clear congressional intent to preempt. 359 U.S. at 244. More specifically, state employment practices law has been held to reflect strong local interests which ought to be recognized if at all possible. *DeCanas v. Bica,* 424 U.S. 351 (1976) (law forbidding hiring of illegal aliens not preempted); *Simpson v. Providence Washington Insurance Group,* 423 F. Supp. 552 (D. Alaska 1976), aff'd., ___ F.2d ___ (9th Cir. 1979) (law forbidding discrimination against persons over 65 not preempted). In fact, it was this Court's great deference to the strong local interest in preventing the denial of employment opportunities that formed the basis for the Court's grant of certiorari in *Colorado Anti-Discrimination Commission v. Continental Air Lines,* 372 U.S. 714 (1963) and its evential decision that the Railway Labor Act does not preempt state law prohibiting employment discrimination:[7] "[t]he obvious importance of even partial invalidation of a state law designed to prevent the discriminatory denial of job opportunities prompted us to grant certiorari." 372 U.S. at 717.

There are also good grounds for believing that Congress even intended the states to have the initial responsibility for addressing employment discrimination problems. Title VII, effective two years after *Colorado Anti-discrimination Commission* was decided, specifically stated that

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[7]No difference in result can be based upon the fact that the Railway Labor Act and not the National Labor Relations Act, was before this Court in *Colorado Anti-Discrimination Commission v. Continental Air lines, supra. Burns v. Southern Pacific Transportation Co., supra,* 589 F.2d at 406 n.1.

it did not preempt state equal rights and anti-discrimination laws. 42 U.S.C. §2000e-7. Moreover, Title VII even requires exhaustion of state remedies before resort may be had to federal administrative or judicial remedies pursuant to Title VII. 42 U.S.C. §2000e-5.

III.

ARGUMENT IN OPPOSITION IF APPELLANT'S JURISDICTIONAL STATEMENT IS DEEMED TO BE A PETITION FOR WRIT OF CERTIORARI.

A. The Alaska Supreme Court fully considered and correctly decided the issues.

The Alaska Supreme Court in its extensive opinion analyzed the factual and philosophical origins of section 158(a)(3) of the National Labor Relations Act, Title VII of the 1964 Civil Rights Act, and the Alaska human rights law, AS 18.80.220. That analysis, which included by reference the court's decision in *Bald v. RCA Alascom, supra,* concluded that there was nothing inconsistent with the aim of the NLRA to alleviate industrial strife and improve the lot of workers and the aim of Title VII and state civil rights acts to prevent the use of irrelevant and stigmatizing criteria to bar well qualified persons from employment. *Bald v. RCA Alascom, supra,* 569 P.2d at 1335. That analysis is correct and should not be disturbed.

The union argues that exempting an employee from his obligation to pay union dues pursuant to a collective bargaining agreement will promote labor unrest among the exempted employee's co-workers. Indeed, the union points to a proceeding before the National Labor Relations Board which the union claims was spawned by the decisions of the Ninth Circuit in *Anderson* and *Burns* and by the decision of the Alaska Supreme Court in *Wondzell.*

See *Scandia Log Homes v. L.P.I.W.*, NLRB Case No. 19-CA-10925, Appellant's Jurisdictional Statement at A70-97. In fact, from the documents submitted in the *Scandia* proceeding, it is evident that the employer, the union and the employees began negotiations over the religious accommodation question in June 1978, some three months before *Anderson, Burns and Wondzell* were even decided by the appelate court.

With regard to the factual question of whether or not this union will suffer undue hardship, the union is required to show *actual* hardship on the employee's co-workers or a disruption of the work routine. Proof of co-worker grumblings or unhappiness is also insufficient to sustain the union's burden. *Anderson v General Dynamics, supra,* 589 F.2d at 402. Even less persuasive will be testimony concerning hypothetical hardships based on assumptions about accommodations which have never been put into practice. *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1976).

In the instant appeal, the Alaska Supreme Court correctly determined that the union had failed to demonstrate undue hardship by the loss of a $6.75 payment of union dues by Wondzell where no employee other than Wondzell was subject to the union's jurisdiction and shared Wondzell's theological anti-union beleifs. Should the union experience a widespread refusal to pay dues at some future time, it could then establish undue hardship. *Wondzell v. Alaska Wood Products, supra,* ___ P.2d at ___. Until such time as the union can demonstrate actual hardship and is denied its relief, the Alaska Supreme Court's decision should not be disturbed.

B. The decision below follows an unbroken line of authority.

The Alaska Supreme Court held below that (1) state courts had jurisdiction to hear employment discrimination matters in a labor-management context; (2) that the existence of a union security agreement did not excuse a union from its duty not to discriminate under state law and that (3) in the absence of undue hardship, the union must reasonably accommodate the religious beliefs of those who come under the jurisdiction of the union security agreement. This decision is consistent with a long line of federal authority on the subject of discriminatory employment practices involving unions covered by the NLRA or the Railway Labor Act. *TWA v. Hardison, supra,* 432 U.S. at 79 (collective bargaining contract may not be employed to violate Title VII); *Colorado Anti-Discrimination Commission v. Continental Airlines, supra,* 372 U.S. at 724 (federal labor relations act does not bar states from protecting its employees against employment discrimination); *Yott v. North American Rockwell, supra,* 602 F.2d at 907 (union's offer to permit employee to substitute union dues payment by contribution to charity of employee's choice, including his own church, was good faith effort to accommodate employee's religious beliefs); *Anderson v. General Dynamics Convair Aerospace Division, supra.* 589 F.2d at 401 (charity contribution in lieu of union dues payment does not cause undue hardship as a matter of law); *McDaniel v. Essex International, supra,* 571 F.2d at 343 (union security provisions of Taft-Hartley Act do not relieve employer or union of duty to make reasonable accommodation to individual religious needs of employees); *Cooper v. General Dynamics, supra,* 533 F.2d at 169

(neither passage of the health care exemption nor passage and amendment of Title VII precludes or trenches in any direct way upon union security agreement).

Furthermore, the Alaska Supreme Court has taken great pains not to rule on this appeal in such a manner that the decision under state law would conflict with the decisions under federal law on the same subject. Upon notification that the federal cases upon which it had based its original decision in *Wondzell* were no longer good law, the court vacated its earlier opinion and adopted the ninth circuit's analysis in *Anderson* and *Burns.* The opinion in *Wondzell* is now consistent with an unbroken line of federal authority. The appellant has offered no other case involving similar facts which would support a contrary result under civil rights law; nor has it offered any justification for an opinion from this Court that would leave the Alaska human rights law in a position anomolous to that of Title VII where relief would be afforded under Title VII but not under AS 18.80.220 under the same set of facts.

IV.

CONCLUSION

Wherefore, Appellee Alaska State Commission For Human Rights respectfully submits that the question upon which the cause depends is so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal, or in the alternative to affirm the judgment entered in the case by the Supreme Court of the State of Alaska. Should this Court deem appellant's jurisdictional statement to be a petition for writ of certiorari, then appellee respectfully requests that the petition be denied.

Respectfully submitted,

AVRUM M. GROSS
Attorney General,
State of Alaska

CAROLYN E. JONES
Assistant Attorney General
420 L Street
Suite 100
Anchorage, Alaska 99501
(907) 276-3550

Counsel for Appellee.

APPENDIX

APPENDIX

Bernadine BALD, Appellant,

v.

RCA ALASCOM and Teamsters Local 959, Appellees.

No. 2554.

Supreme Court of Alaska.

Oct. 14, 1977.

As Corrected Dec. 8, 1977.

OPINION

Before RABINOWITZ and CONNOR, J.J., and DIMOND, J. Pro Tem.

CONNOR, Justice.

In this case, a worker whose religious convictions forbid affiliation with a labor union alleges that she was wrongfully discriminated against by her employer and the union which represents its employees. The issue on appeal does not concern the merits of her allegations, but only whether this case is within the jurisdiction of the state courts. The union and the employer argue that under the principle of federal preemption, exclusive jurisdiction rests with the National Labor Relations Board (NLRB). We have concluded that the courts of Alaska do have jurisdiction over this case.[1]

Bernadine Bald, plaintiff and appellant, was employed as a long-distance telephone operator by defendant and appellee RCA Alaska Communications, Inc. (hereafter "Alascom"). Her position was covered by a union con-

[1] In *Wondzell v. Alaska Wood Products, Inc.*, Nos. 2792 & 2804, now pending before us, we will consider resolution of the merits of a dispute of this type.

tract with Teamsters Local 959, the other defendant and appellee. The contract contained a union security provision, requring all employees to join the union within 30 days of initial employment, and thereafter maintain union membership. The employment was within the coverage of the National Labor Relations Act, 29 U.S.C. §151 *et seq.* (NLRA).

Bald is an adherent of the Seventh-Day Adventist faith. That religious persuasion forbids membership in, or contribution to, labor organizations.[2] In August 1974, she ceased paying union dues, and offered to contribute an equivalent sum to a mutually-agreed-upon charity and forego all union benefits. She alleged that Alascom and the Teamsters would not agree to such an accommodation.

She thereupon filed this action in superior court, alleging violations of AS 18.80.-220(a)[3] and the federal and state Bills of Rights. She sought damages and declaratory and injunctive relief.

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[2]We take judicial notice from the record in *Wondzell v. Alaska Wood Products, Inc., supra,* no. 1 which is pending before us, that Seventh-Day Adventists believe that it is contrary to God's will for them to associate with labor organizations. They cite passages in the Bible which instruct workers to obey their employers, and hence believe that unions stir up labor-management strife which would not exist if workers followed these Biblical precepts rather than organizing. They believe that economic coercion, such as strikes and boycotts, is not a proper means to further even the most legitimate and desirable ends. Further, they are concerned that a labor union demands of them loyalty to earthly goals which is contrary to their first loyalty to God. Paying money to the union without joining it is not an acceptable compromise; giving financial support to a union, as well as having one's name on its membership rolls, is unacceptable to Adventists.

[3]AS 18.80.220(a) reads in relevant part as follows:

"*Unlawful employment practices.* (a) It is unlawful for

(1) an employer to refuse employment to a person, or to bar him from employment, or to discriminate against him in com-

[footnote continued]

The defendants moved to dismiss on the grounds that the NLRA preempts the field so that she may not rely on the state civil rights laws, and that exclusive jurisdiction to pass upon questions related to the federal act is vested in the NLRB and the federal courts.[4] The trial court on September 24, 1975, granted the motion for want of jur-

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pensation or in a term, condition, or privilege of employment because of his race, religion, color or national origin, or because of his age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood;

(2) a labor organization, because of a person's sex, marital status, changes in marital status, pregnancy, parenthood, age, race, religion, color or national origin, to exclude or to expel him from its membership, or to discriminate in any way against one of its members or an employer or an employee.

[4]The issues of substantive preemption and jurisdiction are intertwined. The United States Supreme Court declared in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), that the NLRB has exclusive jurisdiction over activities which are"arguably" subject to sections 7 or 8 of the NLRA, thus excluding both state and federal court jurisdiction in such matters. However, there are exceptions to this exclusive jurisdiction. Sections 301 and 303 of the Labor Management Relations Act, 29 U.S.C. §185 and §187, respectively, provide for federal court jurisdiction over §8(b)(4) unfair labor practice litigation and breaches of the collective bargaining agreement. *See Smith v. Evening News Ass'n,* 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). In *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967), the Supreme Court held that there is federal court jurisdiction over litigation involving a breach of the duty of fair representation. Despite the NLRB's extensive jurisdiction, it does not normally entertain claims under either federal or state civil rights laws. Hence a decision that AS 18.80 is preempted by the federal law would also be a decision that the proper forum is the NLRB. A decision that Ms. Bald can maintain her state cause of action would also be a decision that she is entitled to proceed in state court. AS 22.10.020(c).

isdiction over the subject matter. From that judgment this appeal was taken. Thus, the merits of Bald's claim are not before us.

At the time of the hearing in superior court, Bald had not been discharged from her job. Her brief states that she was discharged by Alascom, at the request of the Teamsters, after the hearing.

I

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), permits union security agreements as an exception to its general rule that an employer may not discriminate against a worker because of his membership or nonmembership in a union.[5] Section 8(b)(2), 29

[5]Section 8(a)(3) makes it an unfair labor practice for an employer:

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such

[footnote continued]

U.S.C. §158(b)(2), in forbidding unions to discriminate against workers for reasons other than nonpayment of dues, by negative implication permits discrimination for that reason.[6]

The preemption principle is derived from the supremacy clause of article VI of the federal Constitution, which declares that federal law shall be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[1] The principle is far from easy to apply. No two cases are factually alike. Preemption tests or standards are necessarily phrased in general or abstract terms which are of limited usefulness in applying the principle to a concrete set of facts. In each case, a balance must be struck between the competing demands of federal uniformity and local autonomy. We must look to the policy, intent, and context of the federal statute to determine whether application of the state law would frustrate the operation of the federal one. *See generally, e.g., Hines v. Davidowitz*, 312 U.S. 52, 66-68, 61 S.Ct. 399, 403-05, 85 L.Ed.

membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

[6]Section 8(b)(2) makes it an unfair labor practice for a union:

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

581, 586-87 (1941); *Id.* at 75-81, 61 S.Ct. at 408-10, 85 L.Ed. at 591-94 (Stone J., dissenting); G. Gunther, *Cases and Materials on Constitutional Law* 357-67 (9th ed. 1975); Note, Pre-emption as a preferential Ground: A New Canon of Construction, 12 *Stan. L. Rev.* 208 (1959).

In the field of labor-management relations, the leading case discussing the principles of preemption is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed.2d 775 (1959). In *Garmon*, the Supreme Court set aside a state court award of tort damages to an employer against a union for engaging in recognitional picketing. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by . . . or constitute an unfair labor practice under [federal labor statutes]," the Court said, exclusive jurisdiction is in the NLRB and state remedies are preempted. *Id.* at 244, 79 S.Ct. at 779, 3 L.Ed.2d at 782.

Additional light is shed on this subject by two other United States Supreme Court cases. *International Association of Machinists v. Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958), held that a state damage remedy for wrongful expulsion from a union was not preempted. The Court reached the opposite result, however, in *Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), where the union not only expelled the worker but, pursuant to a union shop contract, also procured his dismissal from his job, for tardy payment of dues. In *Lockridge*, the Court distinguished *Gonzales* on the ground that *Gonzales* implicated only internal union matters, while *Lockridge* concerned the construction of a contract term, the union security clause, which is subject to pervasive and complex federal regulation.

The *Garmon* court distinguished *Gonzales* on the ground that wrongful expulsion was "a merely peripheral concern" of the federal labor statutes. 359 U.S. at 243,

79 S.Ct. at 778, 3 L.Ed.2d at 782. On preemption by the NLRA, *see generally Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

Likewise, the *Garmon* court cited cases recognizing that there is no federal preemption of "Interests . . . deeply rooted in local feeling and responsibility" absent clear congressional intent to preempt. 359 U.S. at 244, 79 S.Ct. at 779, 3 L.Ed.2d at 782. The cited cases upheld the states' power to take action to prevent or quell labor-related violence which threatens the public peace.[7] But state employment practices laws have also been held to reflect strong local interests which ought to be recognized if at all possible. *DeCanas v. Bica*, 424 U.S. 351, 356-58, 96 S.Ct. 933, 936-59, 47 L.Ed.2d 43, 49-50 (1976)(law forbidding hiring of illegal aliens not preempted); *Simpson v. Providence Washington Ins. Group*, 423 F.Supp. 552, 556 (D. Alaska 1976) (law forbidding discrimination against persons over 65 not preempted). And, as we shall discuss later in this opinion, there is reason to believe that Congress itself assigned the initial battle against employment discrimination to local responsibility when it placed an exhaustion of state remedies requirement in the 1964 Civil Rights Act. 42 U.S.C. §2000e–5, discussed on pages 13–15 *infra*.

Courts considering preemption problems somewhat similar to the one facing us have found that state laws were not preempted.

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[7]The United States Supreme Court recently held that under this rule a tort action in state court by a worker against his union for intentional infliction of emotional distress was not preempted. *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

In *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714, 724, 83 S.Ct. 1022, 1027, 10 L.Ed.2d 84, 91 (1963), it was claimed that Continental had violated state laws against racial discrimination in hiring. Continental answered the claim with the assertion, *inter alia*, that the Railway Labor Act, 45 U.S.C. §151 *et seq.* had preempted the field. The Railway Labor Act is similar to the National Labor Relations Act, and sets out the principles of union recognition and collective bargaining for employees of interstate carriers. The court decided against Continental. Nowhere did that act mention racial discrimination, the Court pointed out. Its purpose of regulating union activity would in no way be frustrated by enforcing state civil rights laws. Even if the purpose of the federal and state laws were the same, the Court said, there is no preemption unless enforcement of the state law would in some way frustrate the aims of the federal one. 372 U.S. at 722, 83 S.Ct. at 1026, 10 L.Ed.2d at 90.

In *Walker Mfg. Co. v. Industrial Comm.*, 27 Wis.2d 669, 135 N.W.2d 307 (1965), the Wisconsin Supreme Court held that a state law against age discrimination in employment was not preempted by the NLRA even with respect to employment under NLRB jurisdiction. The court relied principally on *Continental*, and held that the state and federal laws served different purposes, that age discrimination is a "merely peripheral concern" of the federal labor laws, and that enforcement of the state law would in no way frustrate federal labor policy.

New York and California courts have held that they have jurisdiction to enjoin racial segregation in unions which hold collective bargaining contracts under federal labor law, despite arguments that the NLRA preempts

the field. *Williams v. Int'l Brotherhood of Boilermakers*, 27 Cal.2d 586, 165 P.2d 903 (1946); *James v. Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329 (1944); *Gaynor v. Rockefeller*, 21 A.D.2d 92, 248 N.Y.S.2d 792, 803-04 (App. Div. 1964), *aff'd*, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627 (1965).

In *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 2d 842 (1967), the Supreme Court held that the preemption principle did not bar tort suits by union members against unions for breach of duty of fair representation. This duty, imposed by federal labor law, requires the union to represent fairly all workers in its bargaining unit and not favor some at the expense of others.

In the case at bar, as in *Vaca* and the California and New York cases, the principal dispute is not between labor and management but between an individual worker and the union. Ms. Bald had no grievance against her employer until the union sought her dismissal for nonpayment of union dues.

The union and the employer in this case seek to distinguish these cases. Discrimination on the basis of failure to pay union dues, they argue, differs for these purposes from all other forms of discrimination. Accusations that a union or employer has discriminated on the basis of race or sex or age are merely peripheral concerns of the federal labor laws, they acknowledge. On the other hand, it is their position that sections 8(a)(3) & (b)(2) of the NLRA clearly give unions and employers the power to discriminate against workers who do not pay union dues. Far from being peripheral, union security is central to the entire scheme of federal labor-management law.

While this argument has some surface appeal, there are countervailing considerations which persuade us to reject it. It is necessary to inquire further into the nature of the

state interest in regulation and the potential for interference with the federal regulation. Under a formalistic application of the *Garmon* principle, it is arguable that this suit would be preempted. However, as the United States Supreme Court noted in *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S 290, 97 S.Ct. 1056, 51 L.Ed.2d 338, 349 (1977), there are other factors to be considered in departing from a strict application of the *Garmon* rule. We think there is little risk that carefully drawn relief would interfere with the effective administration of national labor policies. Finally, the law of employment discrimination illustrates an express and overriding state interest. The National Labor Relations Act is only one of the two bodies of law which is of relevance to this appeal. We now turn to a discussion of the civil rights laws which have been enacted to ban religious discrimination in employment.

II

Employment discrimination by either employers or unions on the basis of religion is forbidden by 42 U.S.C. §2000e–2. This section is part of Title VII of the Civil Rights Act of 1964, and is administered by the federal Equal Employment Opportunity Commission.

The presence of §2000e–2 on the federal statute books supports Ms. Bald's position. Of course, one federal statute cannot preempt another, so §2000e–2 does not compel the conclusion that AS 18.80 is not preempted. But it indicates that there is a federal statute and a federal agency which, unlike the NLRA and the NLRB, have the explicit purpose of preventing religious discrimination in the labor-management context.[8] The Civil Rights Act prohibits discrimination by unions as well as by employers. Even within the federal government, the NLRB is not the only agency concerned with these matters.

Furthermore, §2000e–5, also part of Title VII, requires exhaustion of state remedies, if any, before federal remedies – administrative or judicial – may be utilized.[9] In light of this, a decision that another federal statute preempts those state remedies would be difficult to justify, particularly since the congressional intent is quite clear that Title VII is to be read harmoniously with the NLRA.

The relationship of the NLRA and the Civil Rights Act was reviewed by the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed. 2d 147 (1974). A worker fired from his job, allegedly because of hs race, filed a grievance pursuant to the grievance procedure in his union contract, which had been negotiated under the NLRA. The grievance arbitrator decided against him. After exhausting administrative remedies in the Equal Employment Opportunity Commission, the worker brought a civil action in federal

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[8]We reviewed the similarities and differences between Title VII and AS 18.80 in *Loomis Electronic Protection, Inv. v. Schaefer*, 549 P.2d 1341 (Alaska 1976), and in *Hotel Employees Union Local 879 v. Thomas*, 551 P.2d 942 (Alaska 1976). The differences are largely in remedies, not of relevance to this case; in substance the two are similar. The state commission's regulations on religious discrimination incorporate the federal regulations under Title VII. 6 AAC 30.010(m)(2); 29 C.F.R. §1605.1.

[9]In 42 U.S.C. §2000e-7, Congress explicitly stated that the 1964 Civil Rights Act preempted state segregation laws, but not state equal rights and anti-discrimination laws.

district court under Title VII of the Civil Rights Act, charging again that he had been terminated because of his race. The employer urged that arbitration and Title VII were exclusive remedies and that the worker, having taken his chance with one, could not then resort to the other. On this basis, the lower courts dismissed the suit.

The Supreme Court unanimously reversed. In so doing, it relied upon congressional intent that there be multiple forums in which to seek remedies for racial discrimination. *Id.* at 47-48, 94 S.Ct. at 1019, 39 L.Ed.2d at 158.[10] The Court explained that the worker had a right under his union contract to nondiscriminatory treatment, but he also had an entirely separate statutory right to be free from discrimination, one that could not be waived even if his union so wished, and one that he would have whether or not there was a union contract. *Id.* at 51-54, 94 S.Ct. at 1021-22, 39 L.Ed.2d at 159-62.

> "We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."

Id. at 59-60, 94 S.Ct. at 1025, 39 L.Ed.2d at 164-65.[11]

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[10] *Accord, United Packinghouse, etc. Union v. N.L.R.B.*, 135 U.S. App. D.C. 111, 118-19, 416 F.2d 1126, 1133-34 n. 11, *cert. denied*, 396 U.S. 903, 90 S.Ct. 216, 24 L.Ed.2d 179 (1969), which considered the other side of the coin: whether the NLRB was ousted of jurisdiction over racial discrimination by Title VII. The court held that it was not.

[11] *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 72, 95 S.Ct. 977, 989, 43 L.Ed.2d 12, 29 (1975), cited by defendants, is not to the contrary. It reaffirms *Alexander's* holding that employees under a union contract may

[footnote continued]

[2] Defendants cite §8(a)(3) of the NLRA, which states that "nothing . . . in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization [for a union shop]." In *Cooper v. General Dynamics*, 533 F.2d 163, 169-70 (5th Cir. 1976)(2-1 decision), *cert. denied*, ___ U.S. ___ , 97 S.Ct. 2972, 53 L.Ed.2d 1091 (1977), a Title VII case brought by Seventh-Day Adventist employees who would not pay union dues, the employer-defendant made this argument unsuccessfully. The court held that the employees' claim was cognizable under Title VII even though they worked under an agency shop arrangement negotiated pursuant to §8 (a)(3) of the NLRA. To read §8(a)(3) to override the Civil Rights Act, the court pointed out, would effectively write it into the federal Constitution. A literal interpretation of §8(a)(3) would make the 1964 Civil Rights Act inapplicable to every employment covered by the NLRA. It is clear that this was not the intent of Congress in enacting the Civil Rights Act (the later of the two statutes), nor has it been the interpretation of courts which have considered the question, including the United States Supreme Court.

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pursue the remedies provided by the civil rights laws. As Ms. Bald points out, that is exactly what she is trying to do.

Nor is *Buckley v. American Fed'n of Television & Radio Artists*, 496 F.2d 305, 312 (2d Cir.), *cert. denied*, 419 U.S. 1093, 95 S.Ct. 688, 42 L.Ed.2d 687 (1974), to the contrary. There the Second Circuit held that a challenge to a union security agreement by workers whose political beliefs were opposed to union membership, was within the exclusive jurisdiction of the NLRB. However, in *Buckley* there were no allegations of discrimination forbidden by the civil rights laws. Where, as here, such allegations are made, *Alexander* appears to dictate a contrary result.

[3] The National Labor Relations Act and the state and federal civil rights acts were enacted 30 years apart, each in response to one of the most monumental social crises of the century. They were enacted for different purposes. The NLRA was enacted in 1935 to alleviate industrial strife and improve the lot of workers. 29 U.S.C. §151. It was substantially amended in 1947 to prevent abuses by unions of the power that the 1935 act had given them. *Id.* §§141, 151. The civil rights laws were passed in an attempt to prevent the use of irrelevant and stigmatizing criteria to bar persons from employment for which they were well qualified. *See* AS 18.80.200.

We have concluded that there is nothing necessarily inconsistent in these aims, and that the laws Alaska has enacted to promote the latter purpose need not give way to the federal laws enacted for the former purpose. We hold that the National Labor Relations Act does not preempt AS 18.80 and does not deprive the courts of this state of jurisdiction to hear the instant case.

The judgment of dismissal is reversed, and the case is remanded to the superior court for further proceedings on the merits.